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In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

MARTIN LINEN SUPPLY COMPANY AND TEXAS SANITARY TOWEL SUPPLY CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 534 F. 2d 585. A prior opinion of the court of appeals (Pet. App. 11a–28a) is reported at 485 F. 2d 1142. A prior opinion of the district court (Pet. App. 29a–39a) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10a) was entered on June 21, 1976. On July 15, 1976, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to August 20,

1976. The petition was filed on July 27, 1976, and was granted on November 1, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause precludes an appeal by the United States from an order, otherwise appealable under 18 U.S.C. 3731, terminating a prosecution in favor of the defendant, where the order was entered in response to a motion filed several days after a mistrial had been declared due to inability of the jury to reach a verdict.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

3. Federal Rule of Criminal Procedure 29(c) provides:

> If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made

> or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT

On December 9, 1971, the United States filed civil and criminal contempt petitions in the Western District of Texas (A. 4–20). The petitions alleged that respondents, two commonly owned linen supply companies, and their president, William B. Troy, violated a consent decree entered in 1969 as the final judgment in an antitrust suit. See Pet. App. 44a–52a.

The district court dismissed the petitions to the extent they alleged violations of Section V(A)(1) of the consent decree.[1] Section V(A)(1) prohibits respondents from "directly or indirectly: (A) Threatening, coercing, inducing or attempting to induce: (1) Any linen rental supplier to refrain, while in business, from furnishing linen supplies to any customer" (Pet. App. 46a–47a). The contempt petitions alleged that respondents threatened their competitors with economic reprisals in violation of this prohibi-

[1] The district court's opinion (Pet. App. 29a–39a) was entered as an order "construing" the consent decree. The court of appeals held that this was a part of the contempt proceedings (Pet. App. 13a, 17a).

tion. The district court concluded, however, that Section V(A)(1) does not prohibit respondents from threatening competitors with economic reprisals, or offering to competitors economic inducements, in order to induce the competitors to quit soliciting linen supply business from respondents' existing customers (Pet. App. 34a–39a). The district court held that the consent decree should not be construed to prohibit the conduct in which respondents allegedly engaged because (*id.* at 38a) "[i]f [respondents] were to be hampered by the restrictions [the United States] seeks to impose * * * they would soon be marked for extinction by predatory competitors * * *."

The United States appealed, and the court of appeals reversed. It wrote that the activities alleged in the petition are violations of the decree "if their announced purpose is to cause [respondents'] competitors to refrain from competing * * *. * * * [T]he use of threats directed at competitors to restrain competition, or to obtain reciprocal noncompetitive agreements, as the Government alleges, goes to the heart of the antitrust problem" (Pet. App. 27a). The court remanded for a trial to determine whether the allegations are true. This Court denied certiorari. 415 U.S. 915.

The prosecution then filed a supplemental criminal contempt petition (A. 21–26).[2] After the prosecution

[2] The first criminal contempt petition had been dismissed in part by the district judge; the United States had dismissed the remainder of the petition without prejudice pending appellate resolution of the district court's decision. The supplemental petition reinstated all the charges.

declined to consent to a bench trial, the district court severed the criminal and civil proceedings. The criminal trial commenced on February 18, 1975.[3]

At the trial, several witnesses described a series of threats of economic retaliation by executives of respondent Martin Linen, directed at various competitors. The witnesses also testified that two executives of respondent Martin Linen threatened Flake Uniform Linen Service with retaliation if it persisted in soliciting customers of respondent Texas Sanitary. The government also presented testimony and documents demonstrating that respondent Martin Linen conducted a retaliatory sales campaign against Flake Uniform. Respondents did not offer any evidence to contradict the government's proof concerning threats.

The jury retired to deliberate on the morning of February 20, 1975. It continued deliberating on the morning of February 21, and court was reconvened shortly after noon on that date, when the jury sent a note to the judge. The jury reported that it had reached a verdict on one defendant but could not reach a verdict with respect to the other defendants (A. 27). Counsel consented to an inquiry about the numerical division of the jury concerning the other defendants (A. 27). The jury was brought into the courtroom, and the district court asked the foreman whether the jury was "hopelessly deadlocked" concerning the two other defendants; the foreman replied that it was (A. 28). He also replied affirmatively to the question whether "further deliberations would

[3] The civil contempt proceedings have not yet been tried.

be absolutely futile and useless" (A. 28). The foreman reported that the jury stood eleven to one for conviction of the two defendants with respect to which it had been unable to reach a verdict (A. 28).

The district court then accepted the verdict of not guilty with respect to Mr. Troy (A. 29), after which the court *sua sponte* declared a mistrial with respect to respondents and excused the jurors (A. 29). Counsel for respondents did not object to the declaration of the mistrial.

After the jurors had departed, the district judge advised counsel that he would be inclined "to enter a judgment of acquittal as to [respondents] if an appropriate motion was made" (A. 31). He remarked that he "almost instructed a verdict for all Defendants in this case" (A. 30) because the case seemed weak to him.

The judge elaborated by explaining (A. 30) that it appeared to him "that this was just nothing in the world but a fight between a bunch of cut-throat competitors in a very competitive business where one of them was fighting at a disadvantage with this consent decree. And the other people were taking advantage. That's the way this thing strikes me." The judge expressed dissatisfaction with the consent decree, stating that in his view it put respondents at a disadvantage as compared to their competitors, who were not under such a decree (A. 31–32). In the opinion of the judge, it was unfair to hold respondents liable for doing things their competitors were not forbidden to do. He went on (A. 32–33): "Sometimes

the Defendant enters into a consent decree and later rues the day that he did it and wishes that he had an opportunity to retry that question again. Once he is under it, then it is up to the Court to let him out of it."

On February 27, 1975, six days after the mistrial declaration, respondents accepted the court's invitation and filed motions for acquittal (A. 34–46). These motions set out the following grounds in support of the request for judgments of acquittal: (1) the fact that the jury was unable to reach a verdict demonstrates that the evidence was insufficient; (2) the acquittal of Mr. Troy shows that the evidence was insufficient; (3) the evidence did not establish that the threats by employees of respondents were made within the scope of their employment, or that the threats amounted to coercion; (4) respondents' conduct was justified because to "'get even' or 'retaliate' was clearly established to be absolutely normal and commonplace in the ebb and flow of competition" (A. 36); and (5) the language of the consent decree was too vague to support a charge of criminal contempt. Respondent Texas Sanitary also argued that the acts of employees of respondent Martin Linen could not be attributed to it.

On April 24, 1975, more than two months after the mistrial had been declared, the district court entered judgments of acquittal. Although the judge did not make findings of fact or conclusions of law, the judgments recited that "the Court finds that the grounds set forth in [the motions for acquittal] are good and

valid and that the Government has failed to prove the material allegations beyond a reasonable doubt; that further this defendant should be found 'not guilty'" (Pet. App. 41a, 43a).

The United States appealed pursuant to the Criminal Appeals Act, 18 U.S.C. 3731. The court of appeals concluded that the Double Jeopardy Clause bars the government's appeal. The court observed that the proceedings in the district court ended in an "acquittal" entered under Fed. R. Crim. P. 29(c) (Pet. App. 4a–5a). It quoted *United States* v. *Jenkins*, 420 U.S. 358, 370, as establishing a "general rule" (Pet. App. 7a) that "it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." Because a reversal of the district court's "acquittal" would enable the government to try respondents a second time, the court concluded that the "general rule" announced in *Jenkins* "leads inescapably to the conclusion that no appeal lies from the directed verdict ordered by the court below" (Pet. App. 7a–8a).[4]

The government had relied in the court of appeals upon *United States* v. *Sanford*, 421 U.S. 996. The Ninth Circuit in *Sanford* had dismissed a government appeal from a post-mistrial order dismissing an

[4] The court of appeals did not discuss or distinguish its apparently contrary decision in *United States* v. *Moon*, 491 F.2d 1047 (C.A. 5).

indictment. This Court remanded the case for reconsideration in light of *Serfass* v. *United States*, 420 U.S. 377, an action which the Fifth Circuit took to mean that the appeal should be permitted in that case (Pet. App. 8a–9a).[5] The court distinguished *Sanford*, however, observing that the district court in *Sanford* had dismissed the indictment long after the time for filing a post-trial motion under Fed. R. Crim. P. 29(c) had elapsed. In the court's view, this made the order in *Sanford* an appealable "pretrial dismissal" (Pet. App. 9a), whereas the order in the instant case was nonappealable because it was an "acquittal" entered pursuant to a motion made within seven days after the mistrial.

SUMMARY OF ARGUMENT

This case is controlled by *United States* v. *Sanford*, No. 75–1867, decided October 12, 1976. In *Sanford*, as here, a trial ended in a mistrial because the jury was unable to agree upon a verdict. Four months later the district court in *Sanford* dismissed the indictment, concluding on the basis of the evidence at trial that the defendants were not guilty of any crime. This Court held that the United States could appeal that order, because a second trial would not violate the Double Jeopardy Clause.

Sanford, taken together with *United States* v. *Wilson*, 420 U.S. 332; *United States* v. *Jenkins*, 420 U.S. 358; and *Serfass* v. *United States*, 420 U.S. 377,

[5] The court of appeals evidently was unaware that almost a month before the date of its decision the appeal in *Sanford* had been dismissed a second time. See *United States* v. *Sanford*, 536 F. 2d 871 (C.A. 9), reversed, No. 75–1867, decided October 12, 1976.

indicates that the critical question in determining whether the government may appeal an order terminating a prosecution in favor of the accused is whether the proceedings on remand, were the prosecution to prevail on appeal, would violate the Double Jeopardy Clause. Further proceedings in the instant case would not violate that Clause, because it was the inability of the jury to agree upon a verdict that gave rise to the necessity for holding a second trial. The Court's analysis in *Sanford* (slip op. 3) is fully applicable here: "The dismissal in this case, like that in *Serfass,* was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend. Since in such cases a trial following the Government's successful appeal of a dismissal is not barred by double jeopardy, an appeal from the dismissal is authorized by 18 U.S.C. § 3731."

There may be reasons why a second trial should not be held in this case, but the Double Jeopardy Clause is not among them. If the district court is right that respondents should prevail in this case because of insufficiency of the evidence, imprecision of the consent decree, or any other reason, respondents are entitled to an affirmance on the merits that would erect a complete shield against reprosecution. But if the district court is wrong, the declaration of a mistrial removes any bar to a second trial.

The court of appeals thought that this case could be distinguished from *Sanford* because here the motion to terminate the prosecution was filed six days after the mistrial was declared, which was within the seven-

day period fixed by Fed. R. Crim. P. 29(c). There is no reason, however, why the propriety of a second trial should turn upon the length of time between the declaration of a mistrial and the filing of a post-mistrial motion. Once the mistrial had been declared, the court was entitled to try respondents a second time; all of the factors that affect the propriety of holding a second trial were fixed at the moment the jury was dismissed. If, at that moment, the district court could have set the case for a second trial without violating the Double Jeopardy Clause, then the United States should be entitled to engage in such appellate proceedings as may be necessary to bring about that second trial.

Respondents have no constitutionally protected interest in preserving the finality of the disposition in their favor. There was here no *verdict* of acquittal. Indeed, there is no verdict at all, the finder of fact—the jury—having divided eleven to one for conviction. The trial judge has no authority to resolve factual disputes in a jury trial, and so no factual determinations would be subject to reexamination at a second trial. As *Wilson, Jenkins,* and *Serfass* make plain, the fact that the case may have terminated in the district court with a judgment on the merits in the defendant's favor does not preclude an appeal by the government to correct errors of law, unless there has been a verdict of acquittal by the finder of fact. There was no such verdict here, and the Double Jeopardy Clause therefore does not bar a second trial of respondents.

ARGUMENT

THE GOVERNMENT MAY APPEAL ANY ORDER, ENTERED AFTER A MISTRIAL HAS BEEN DECLARED, THAT TERMINATES A PROSECUTION IN FAVOR OF A DEFENDANT

A. A VERDICT OF ACQUITTAL BY THE JURY IS THE ONLY ABSOLUTE BAR TO A SECOND TRIAL FOR THE SAME OFFENSE

The court of appeals dismissed the government's appeal in this case because it thought that there is a "general rule" (Pet. App. 7a) that the government may not appeal if success on appeal would lead to further proceedings in the district court concerning the general issue of guilt or innocence. There is, however, no such "general rule." On the contrary, a rule that a second trial invariably violates the Double Jeopardy Clause "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [T]he purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts the power to put the defendant to trial again." *Wade* v. *Hunter,* 336 U.S. 684, 688–689.

This Court has emphasized that a defendant in a criminal trial has important interests in avoiding multiple trials for the same offense. See *Green* v. *United States,* 355 U.S. 184, 187–188. Because of these interests, repetitious trials are to be avoided where possible, and the Double Jeopardy Clause often interposes a bar against multiple trials even where there

is no threat of multiple punishment.[6] See, *e.g., Breed* v. *Jones,* 421 U.S. 519. But multiple trials are not always prohibited. Indeed, multiple trials are an essential and accepted element of our system of justice.

A new trial may be held if the first trial is terminated before verdict because of manifest necessity. The most common of these situations occurs when a mistrial is declared because the jury is unable to agree unanimously. *United States* v. *Perez,* 9 Wheat. 579.[7] A new trial may be held if the accused surrenders his

[6] We do not believe, however, that these considerations pertain to corporations, such as respondents. Corporations cannot be exposed to embarrassment or humiliation. They cannot be imprisoned. The Double Jeopardy Clause, which mentions only "jeopardy of life or limb," is most concerned with exposure to punishments of a sort corporations cannot suffer. A criminal prosecution against a corporation exposes it to nothing that a civil suit does not. We therefore submit that the usual principles of *res judicata* afford to corporations sufficient protection against repetitious litigation. See Note, *Double Jeopardy and Corporations: "Lurking in the Record" and "Ripe for Decision,"* 28 Stan. L. Rev. 805 (1976). This Court has held that other provisions of the Fifth Amendment, such as the Self-Incrimination Clause, do not apply to corporations. See *Bellis* v. *United States,* 417 U.S. 85; *Wilson* v. *United States,* 221 U.S. 361. We know of no reason why the Double Jeopardy Clause should apply to corporations when the Self-Incrimination Clause does not. (The only court of appeals that has explicitly considered the question, however, has held that the Double Jeopardy Clause does apply to corporations. *United States* v. *Security National Bank,* C.A. 2, No. 76–1283, decided December 6, 1976. As this discussion indicates, we believe that this case was wrongly decided.) We did not argue in the court of appeals, however, that the Double Jeopardy Clause does not apply to corporations, and accordingly we have not presented it as a question for resolution by this Court.

[7] See *Logan* v. *United States,* 144 U.S. 263; *Dreyer* v. *Illinois,* 187 U.S. 71; *Moss* v. *Glenn,* 189 U.S. 506; *Keerl* v. *Montana,* 213

valued right to submit his case to the jury empaneled at the first trial. *United States* v. *Dinitz,* 424 U.S. 600. A new trial may be held whenever a conviction is set aside on direct appeal (*Forman* v. *United States,* 361 U.S. 416; *United States* v. *Ball,* 163 U.S. 662) or on collateral attack (*United States* v. *Tateo,* 377 U.S. 463), even though the error requiring reversal should have led to outright acquittal at the first trial.[8] For example, if a conviction is reversed because the evidence was insufficient to allow the jury to convict, a second trial still may be held. *Forman* v. *United States, supra,* 361 U.S. at 424–425; *Bryan* v. *United States,* 338 U.S. 552, 560.[9]

In our view, only a "verdict of acquittal at the hands of the jury" (*Forman* v. *United States, supra,* 361 U.S. at 426) is an absolute bar to further proceedings. A verdict of acquittal is final even if returned under erroneous instructions. *Fong Foo* v. *United States,* 369 U.S. 141 (court instructed the jury

U.S. 135. All of these involved mistrials because of jury disagreement. See also *Simmons* v. *United States,* 142 U.S. 148; *Thompson* v. *United States,* 155 U.S. 271; *Wade* v. *Hunter, supra; Downum* v. *United States,* 372 U.S. 734, 736; *Gori* v. *United States,* 367 U.S. 364, 368.

[8] In the extraordinary case of *Hopt* v. *Utah,* 104 U.S. 631, 635, 110 U.S. 574, 114 U.S. 488, 492, 120 U.S. 430, 442, this Court reversed convictions after three trials for the same offense before affirming a conviction after a fourth trial.

[9] But cf. *United States* v. *Wiley,* 517 F. 2d 1212 (C.A. D.C.), which holds that, after a conviction is reversed because the evidence was insufficient, a second trial should not be held unless the insufficiency is attributable to causes beyond the control of the prosecution. This holding is predicated upon the powers conferred on appellate courts by 28 U.S.C. 2106, rather than on the Double Jeopardy Clause.

to return a verdict of not guilty in the middle of the prosecution's case, and the jury did so); *Kepner* v. *United States,* 195 U.S. 100; see also *United States* v. *Jenkins,* 420 U.S. 358 (verdict of acquittal by the judge acting as factfinder in a bench trial). In any other event, however, there is no absolute bar; rather, the court must look to the nature of the trial and the occasion that led to the termination of the prosecution.

If the defendant seeks or consents to a termination, even in mid-trial, without insisting upon his "valued right" to receive the verdict of the jury then empaneled (*Wade* v. *Hunter, supra,* 336 U.S. at 689), a new trial is allowed in almost every instance. See *United States* v. *Dinitz, supra.* It should make no difference whether the mid-trial termination is called a mistrial, an acquittal, or an order dismissing the indictment; whatever it is called, it is entered by the judge, who is not a factfinder and has no power to convict the accused. The word "acquittal" has no talismanic quality for double jeopardy purposes. *United States* v. *Sisson,* 399 U.S. 267, 270; *United States* v. *Wilson,* 420 U.S. 332, 335–339; *Serfass* v. *United States,* 420 U.S. 377, 392. The inquiry in every case is whether a second trial would deprive the defendant of an interest the Double Jeopardy Clause was designed to protect and, if so, whether that interest must "be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter, supra,* 336 U.S. at 689. A defendant whose trial is aborted at his request—whether by a mistrial, by an

"acquittal" by the judge, or by an order dismissing the indictment—he has not been deprived of his valued right to present his case to the jury but rather has abandoned that right for reasons that seem sufficient to him. As the Court pointed out in *Dinitz*, it is often highly advantageous to defendants to terminate an ongoing trial. As in *Dinitz*, a second trial may be held in such cases if it is required by "the public's interest in fair trials designed to end in just judgments."

The case is more difficult if a trial is aborted over a defendant's objection. See *United States* v. *Jorn*, 400 U.S. 470, 474–475. Then the governing rule is stated by *Illinois* v. *Somerville*, 410 U.S. 458, and a new trial may be held if the first trial was terminated for pressing reasons amounting to "manifest necessity," such as a defect in the indictment that would make it impossible for the trial to end in a valid conviction. In *Somerville* itself the Court upheld a second trial after the first trial had been terminated to allow an indictment to be dismissed and the defendant to be reindicted on a valid charge. It should make no difference if the trial judge uses the words "dismissal of the indictment" rather than "mistrial" to describe the event that leads to the mid-trial termination of proceedings over the defendant's objection. As the Court pointed out, rigid or mechanical rules are inadequate tools to use in determining whether a second trial may be held. 410 U.S. 463, 467.

In sum, when a trial is terminated without a verdict by the finder of fact, the important interests secured by the Double Jeopardy Clause do not invariably

prevent a second trial. The Court strongly emphasized in the recent trilogy of *Wilson, Jenkins* and *Serfass* that an accused has an important interest in the finality of a *verdict* of acquittal by the finder of fact, but it declined to extend that rule to create an interest in the finality of every disposition in the accused's favor. In both *Wilson* and *Serfass* the *proceedings* in the district court terminated in the favor of the accused, yet the Court held that the accused had not acquired such an interest in the finality of that termination that appellate review was precluded. The accused's cognizable interest is in preserving the finality of verdicts of acquittal by the factfinder (as in *Jenkins*), not in preserving from review the finality of all dispositions by the trial court in his favor. Moreover, although an accused has an interest in preserving any findings of fact that may be made in his favor (see *Ashe* v. *Swenson*, 397 U.S. 436), when a trial terminates without a verdict by the factfinder there are no findings of fact to preserve. A second trial therefore cannot deprive the accused of the important interests guaranteed by the Double Jeopardy Clause.[10]

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[10] Several courts of appeals have adopted this view of the Double Jeopardy Clause and have allowed second trials after mid-trial aborts denominated "acquittals" or "dismissals of the indictment." See *United States* v. *Kehoe*, 516 F.2d 7 (C.A. 5), certiorari denied, 424 U.S. 909; *United States* v. *DiSilvio*, 520 F. 2d 247 (C.A. 3), certiorari denied, 423 U.S. 115; *United States* v. *Lee*, 539 F. 2d 612 (C.A. 7), petition for a writ of certiorari pending, No. 76-5187. See also *United States* v. *Sedgwick*, 345 A. 2d 465 (D.C. App.), certiorari denied, 425 U.S. 966. Other courts, however, have

Under the analysis we have set forth above, the court of appeals in the instant case should not have dismissed the appeal.[11] The jury did not return a verdict but was instead unable to agree; it found no facts that would be drawn into question in a second trial. The "acquittal" granted by the district judge two months after the jury had been discharged did not find any facts in respondents' favor, for only the jury is entitled to pass upon the facts; the court can rule only upon questions of law. See, *e.g., Singer* v. *United States,* 380 U.S. 24, 36; *United States* v. *Weinstein,* 452 F. 2d 704 (C.A. 2) (Friendly, J.), certiorari denied *sub nom. Grunberger* v. *United States,* 406 U.S. 917. Respondents were not deprived of their valued right to receive the verdict of the jury; the case went to the jury, which was unable to agree, and respondents did not object to the declaration of a mistrial and the dismissal of the jury. A second trial would not deprive respondents of their interest in preserving the finality of a verdict by the fact-

adopted a rule under which mid-trial terminations called "acquittals" or "dismissals of the indictment" by the trial judge are final, but terminations called "mistrials" may or may not be final. See *United States* v. *Scott*, C.A. 6, No. 76–1533, decided November 23, 1976; *United States* v. *Lucido*, 517 F. 2d 1 (C.A. 6); *United States* v. *Means*, 513 F. 2d 1329 (C.A. 8); *United States* v. *Robbins*, 510 F. 2d 301 (C.A. 6), certiorari denied, 423 U.S. 1048.

[11] Many scholars support our approach. See Friedland, *Double Jeopardy* 310 (1969); Sigler, *Double Jeopardy* 114 (1969); Mayers and Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1 (1960); Miller, *Appeals by the State in Criminal Cases*, 36 Yale L. J. 486 (1927); Note, *Government Appeals of "Dismissals" in Criminal Cases*, 87 Harv. L. Rev. 1822 (1974).

finder, because the factfinder returned no verdict. And although a second trial would expose respondents to additional expense and to another risk of conviction, it has been settled since *United States* v. *Perez, supra,* that such an exposure is consonant with double jeopardy principles when a mistrial is necessary because of jury disagreement.

The Court need not agree with our entire submission in this regard, however, in order to conclude that the court of appeals had jurisdiction over our appeal. This case does not involve a mid-trial dismissal.[12] As we now show, a second trial (and hence jurisdiction over the appeal designed to bring about that trial) was authorized by the single fact that the jury was unable to agree upon a verdict at respondents' first trial.

B. A SECOND TRIAL IS PERMISSIBLE AFTER A JURY IS UNABLE TO REACH A VERDICT AT THE FIRST TRIAL

The court of appeals thought that if a second trial would be required were the government to prevail on appeal, the government may not appeal; if no such proceedings would be required, the government may appeal. We submit that the court of appeals concentrated on the wrong factor. The proper inquiry is whether the further proceedings, after success by the government on appeal, would themselves violate the Double Jeopardy Clause. In other words, if a second trial is not barred by the Double Jeopardy Clause,

[12] The question of the propriety of holding a second trial after a mid-trial dismissal of the indictment at the request of the accused is squarely presented, however, in *New York* v. *Brown*, petition for a writ of certiorari pending, No. 76–358.

the government may appeal in an effort to bring about that second trial. If, on the other hand, proceedings on remand would offend double jeopardy principles, the government may not appeal an adverse disposition in the district court (there would, after all, be no continuing case or controversy in such circumstances).[13] In the instant case, then, the question is whether, after declaring a mistrial and dismissing the jury, the district judge could have set the case for a second trial. Since he could (and, if our appeal is sound on the merits, should) have set the case for another trial, then the government may appeal to require him to do so.[14]

This follows directly from *United States* v. *Sanford*, No. 75–1867, decided October 12, 1976. In *Sanford*, as here, a trial ended in a mistrial because the jury was unable to agree upon a verdict. Four months later the district court dismissed the indictment, concluding that the defendants had an absolute defense (the consent of federal officials) to the crime charged in the indictment. This Court held that the United States was entitled to appeal from that order of dismissal, because a second trial of the defendants would not violate the Double Jeopardy Clause.

[13] In England and some States the prosecution can appeal from judgments of acquittal to secure advisory opinions concerning the propriety of legal rulings by the trial court. See, *e.g.*, *People* v. *Dikeman*, 555 P. 2d 519 (Colo.). Such advisory opinions are not available in the federal system, however, because of the case or controversy requirement of Article III of the Constitution.

[14] See *United States* v. *Wilson*, 534 F. 2d 76 (C.A. 6), which implicitly adopts this analysis. Cf. *United States* v. *Jorn*, *supra*, which allowed the United States to appeal from a post-mistrial order dismissing an indictment.

The Court began in *Sanford* with the settled proposition that, after a mistrial has been declared because of jury disagreement, the Double Jeopardy Clause does not bar a second trial. That is true in the instant case no less than it was in *Sanford*. The Court went on (slip op. 3): "The District Court's dismissal of the indictment occurred several months after the first trial had ended in a mistrial, but before the retrial of respondents had begun. * * * The dismissal in this case, like that in *Serfass*, was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend." The United States therefore was entitled to appeal in order to bring about the second trial that it "had a right to prosecute and that the defendant was required to defend."

And so it is here. Once the district court declared a mistrial and dismissed the jury, any double jeopardy bar to a second trial dissolved. There may be reasons why a second trial should not be held in this case, but the Double Jeopardy Clause is not among them. If the district court is right that a second trial should not be held because of insufficiency of the evidence, imprecision of the consent decree, or any other reason, respondents are presumably entitled to an affirmance on the merits that would erect a *res judicata* barrier against reprosecution.[15] Cf. *United States*

[15] If the insufficiency of the evidence were attributable to causes beyond the control of the prosecution, such as the erroneous mid-trial suppression of evidence at the request of the accused, the question of the propriety of a second trial should be evaluated differently. Cf. *United States* v. *Wiley*, *supra*.

v. *Oppenheimer*, 242 U.S. 85. But if the district court is wrong, then it should have ordered a second trial, and no double jeopardy principle stands in the way of appellate rectification of its failure to do so.

C. IT IS IMMATERIAL THAT THE DISTRICT COURT ACTED ON A MOTION FILED WITHIN SEVEN DAYS OF THE DECLARATION OF A MISTRIAL

The court of appeals concluded (Pet. App. 7a-9a) that *Sanford* does not control this case because in *Sanford* the motion to terminate the proceedings was made several months after the first trial, whereas here it was made six days after the first trial and granted two months later. In the court of appeals' view this made the district court's decision here an unreviewable "acquittal."

This line of argument is untenable. Here, as in *Sanford*, "[t]he *trial* of respondents on the indictment terminated not in their favor, but in a mistrial declared, *sua sponte*, by the District Court" (slip op. 2; emphasis added).[16] On a post-trial motion the district court terminated the *proceedings* in respondents' favor, but the trial had long since ended. The termination of the proceedings in respondents' favor is not significantly different from the termination of the proceedings in defendants' favor in *Sanford*, *Serfass* or *Wilson*. Indeed, the United States may not appeal under the first paragraph of the Criminal Appeals Act until the "proceedings" in the trial court have terminated in defendants' favor.

[16] Cf. *Jenkins*, *supra*, 420 U.S. at 365 n. 7.

Here, as in *Wilson*, in which the indictment was dismissed in response to a motion made within seven days of the termination of the trial, a decision on appeal in the government's favor would simply return the case to the posture it was in before the erroneous termination. In *Wilson* the appeal was permissible because it did not lead to a second trial; here, although reversal on appeal would lead to a second trial, the Double Jeopardy Clause is not offended because a second trial is permitted after a manifestly necessary mistrial.

The functional inquiry in each case is whether the accused has been deprived of something the Double Jeopardy Clause protects. The answer to that question cannot possibly turn upon whether a motion to terminate the proceedings was filed six days, eight days, or two months after the trial ended in a mistrial. Rule 29(c) affords defendants seven days in which to file post-trial motions for judgments of acquittal. There is no reason to suppose that the draftsmen of that Rule thought they were selecting a deadline with constitutional significance, and nothing in the commentary of the Advisory Committee would support such a conclusion. Rule 29(c) sets a convenient time limitation for the filing of a particular motion; it has no meaning whatever for double jeopardy purposes. A district court, responding to a motion filed under Rule 29(c), may state reasons (such as the alleged vagueness of the consent decree) why there should not be further proceedings, but these reasons are not founded on the Double Jeopardy

Clause and they neither add to nor detract from the protections of that Clause.

In sum, the timing of the post-trial motion does not affect the interests protected by the Double Jeopardy Clause. An accused has no greater interest in the finality of a legal decision by a district judge (filed two months after the trial ended) when his motion is filed six days after the mistrial than when his motion is filed eight days after the mistrial. Nor has he any greater interest in avoiding the rigors of a second trial in the one instance than in the other. And his interest in preserving his valued right to have the case decided by the first jury empaneled is similarly not affected by the timing of a post-mistrial motion; the case was submitted to the first jury, and his valued right was preserved.

Thus, what happens *after* a mistrial has been declared is irrelevant to the constitutional analysis. All of the factors that either allow or forbid a second trial are fixed at the moment the jury is dismissed. If, at that moment, the district court could have set the case for a second trial without violating the Double Jeopardy Clause, then the United States should be able to engage in such appellate proceedings as may be necessary to bring about that second trial. The fact that the district court may act in response to motions filed within seven days of the mistrial shows that it acted within the authority granted it by the Rules of Criminal Procedure, but it shows nothing about the power of an appellate court to correct an error or about the application of the Double Jeopardy Clause.

Suppose that the district court in this case had granted the judgments in respondents' favor (as it did) two months after the mistrial had been declared, but the district court *sua sponte*[17] had declared that it made a legal error and should not have entered judgments for respondents. It is unlikely that the district court's correction of its own mistake would violate the Double Jeopardy Clause.[18] If that action would not violate the Clause, how could it violate the Clause for a court of appeals to inform the district court that it erred and to direct it to proceed to a second trial?

Similarly, suppose that in this case the district court had denied respondents' motions for judgments of acquittal and set a date for a second trial, and respondents were allowed to take an interlocutory appeal. If the court of appeals had reversed and ordered the entry of judgments of acquittal, could it seriously be argued that the United States could not seek review in this Court? In *Wilson* this Court observed that such a ruling would be reviewable in this Court, and it remarked (420 U.S. at 345): "It is difficult to

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[17] Or at the request of the prosecution within 30 days. See *United States* v. *Dieter*, No. 75–1547, decided October 12, 1976.

[18] In *Forman* v. *United States*, *supra*, a court of appeals initially reversed a judgment of conviction and ordered the indictment to be dismissed. On rehearing it ordered a second trial to be held. The defendants argued that the initial decision of the court of appeals gave them a vested right to dismissal of the indictment and that the Double Jeopardy Clause prevented the court from changing its mind. This Court disagreed (361 U.S. at 424–426), holding that the court was entitled to correct its own error and to order such further proceedings as it deemed appropriate, even though the defendants had not asked for a new trial.

see why the rule should be any different simply because the defendant has gotten a favorable post-verdict ruling of law from the District Judge rather than from the Court of Appeals, or because the District Judge has relied to some degree on evidence presented at trial in making his ruling." The situation here is the same: If the United States could have obtained review in this Court of an appellate decision that respondents should be acquitted, there is no reason why the United States may not obtain review in the court of appeals of the identical post-trial decision by the district court.

D. IT IS IMMATERIAL THAT THE DISTRICT COURT'S ORDER TERMINATING THE PROSECUTION IS BASED UPON A BELIEF THAT THE PROSECUTION FAILED TO PROVE ITS CASE

The court of appeals' belief that *Jenkins* controls this case and forbids a second trial apparently is based in part upon the fact that the district court's judgments of acquittal were grounded upon the events of trial and go to the "general issue."[19] Respondents have made the similar argument that the Double Jeopardy Clause bars appeal because the district court's decision was "based on evidence adduced at trial" (Br. in Opp. 4).

[19] The court of appeals may have been confused about the nature of the judgment in this case. It characterized the district court's ruling as a "directed verdict of acquittal" (Pet. App. 2a, 3a, 5a n. 6, 6a), as if the judge had instructed the jury to return a verdict of acquittal. That was the situation in *Fong Foo* v. *United States*, *supra*, but not here; in the instant case the jury had been discharged two months before the district court entered a "judgment of acquittal." "Directed verdicts" were abolished by Fed. R. Crim. P. 29(a).

Jenkins does not control this case. It involved an acquittal, on the facts, by the trier of facts. In a jury trial, however, only the jury tries the facts. "[T]he Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before [a jury,] the tribunal which the Constitution regards as most likely to produce a fair result." *Singer* v. *United States*, *supra*, 380 U.S. at 36. In a jury trial the judge may determine whether the evidence, in the light most favorable to the government, is sufficient to support a conviction, but this is an entirely legal question; the judge is not empowered to resolve disputed issues of fact, and an appeal would not lead to a second trial at which facts found in the appellee's favor by the first tribunal would be reexamined.

As we understand respondents' argument, it is that even though the district court could have allowed a second trial in this case, the judge's decision not to do so, based on facts outside the indictment, is immune from scrutiny. This mistakes the nature of the inquiry appropriate in cases of this sort: the proper question is whether further proceedings in the district court would be forbidden by the Double Jeopardy Clause, not whether the district court relied upon one or another ground in support of its decision to terminate proceedings. In *Wilson* the district court relied on facts introduced at trial, and the court of appeals held that this made the district court's action an unreviewable acquittal, yet this Court held that the decision dismissing the indictment could be reviewed, and that its characterization as an acquittal

was constitutionally irrelevant to the government's right to appeal (420 U.S. at 347–351). In *Serfass* the district court decided the "general issue" of guilt or innocence, yet the Court held that its decision could be reviewed. In *Sanford* the district court relied on facts adduced at trial and decided the general issue by holding that there was a complete defense of governmental consent, yet this Court held that the district court's decision could be reviewed and a second trial could be held if the district court had erred. In short, a district court's reliance on facts outside the indictment is not sufficient to insulate its decisions from appellate review, so long as the proceedings on remand in the district court would not themselves violate the Double Jeopardy Clause.

Even a decision by the district court that the evidence is insufficient to support the conviction, and the consequent entry of a judgment of acquittal on a post-trial motion pursuant to Rule 29(c), does not create a bar to appellate review. In *Jenkins, supra,* 420 U.S. at 365, the Court explained that "where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted." See also *United States* v. *Donahue,* 539 F. 2d 1131 (C.A. 8); *United States* v. *Burroughs,* 537 F. 2d 1156 (C.A. 4); *United States* v. *Cravero,* 530 F. 2d 666 (C.A. 5); and *United States* v. *De Garces,* 518 F. 2d 1156 (C.A. 2), which hold that the prosecution may appeal from post-trial acquittals, on the basis of the evidence adduced at trial, where the jury has returned a verdict of guilty.

Wilson, Serfass, Jenkins, Donahue, Burroughs, Cravero and *De Garces* establish that nothing in the

Double Jeopardy Clause creates a barrier to appellate review of decisions by the district judge, in jury trials, going to the general issue or based upon the facts adduced at trial. The reexamination of the decision of the judge, in a jury trial, does not itself violate the Fifth Amendment. That being so, the only objection to an appeal by the prosecution in the instant case is that a decision in its favor would lead to a second trial. That objection is insufficient; the second trial is authorized by the jury's inability to agree upon a verdict at the first trial. This case is, therefore, exactly like *Sanford* (slip op. 3): "The dismissal in this case, like that in *Serfass,* was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend. Since in such cases a trial following the Government's successful appeal of a dismissal is not barred by double jeopardy, an appeal from the dismissal is authorized by 18 U.S.C. § 3731."

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to consider the merits of the appeal.

Respectfully submitted.

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